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In the

Supreme Court of the United States

OCTOBER TERM, 1967

LLOYD EDWARDS, as Executor of the Will of Seren P. Hansen, Deceased,

Petitioner,

vs.

V. LEE PHILLIPS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the Judgment of the United States District Court for the District of Colorado.

OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix. It has not yet been officially reported. The unpublished memorandum and order of the District Court is also printed in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1967, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the income of an estate payable to a Danish School District was to be used exclusively for educational purposes within the meaning of Section 642(c) of the Internal Revenue Code of 1954.

Whether the Danish School District, beneficiary under the Will of Seren P. Hansen, may be regarded as *any* corporation or association organized and operated exclusively for educational purposes within the meaning of Section 2055 (a) (2) of the Internal Revenue Code of 1954, or, in the alternative, whether the governing body of said School District may be considered trustees of property to be used exclusively for educational purposes within the meaning of Section 2055 (a) (3) of the Internal Revenue Code of 1954.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 642 (c) and 2055 (a) of the Internal Revenue Code of 1954. Section 642 (c) of the Internal Revenue Code of 1954 provides in part as follows:

> "In the case of an estate or trust • • • there shall be allowed as a deduction in computing its taxable income (in lieu of the deductions allowed by section 170 (a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument • • • is to be used exclusively for • • • educational purposes, • • •."

Section 2055 (a) on the Internal Revenue Code of 1954 provides in part as follows:

> "(a) In General—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devices, or transfers • • •
>
> (1) to or for the use of the United States, any State, Territory, and political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) to or for the use of any corporation organized and operated exclusively for • • • educational purposes • • •.
>
> (3) to a trustee or trustees, • • • but only if such contributions or gifts are to be used by such trustee or trustees • • • exclusively for • • • educational purposes • • •."

STATEMENT OF THE CASE

There is no dispute as to the facts of this case. The following facts were stipulated. (R. 13-18)

This is a civil action for the refund of federal estate taxes in the amount of $21,521.89 and federal income taxes for the year 1962 in the amount of $186.84 which were paid to and assessed by the Respondent acting as District Director of Internal Revenue for the District of Colorado.

Seren P. Hansen, also known as Seren Peter Hansen, died testate on May 17, 1962, a resident of Berthoud, Colorado.

On July 9, 1962, Petitioner was appointed executor of the said estate and letters testamentary were issued. Petitioner is still the duly qualified and acting executor of the said estate.

The decedent's last Will and Testament was allowed by the County Court of Larimer County, Colorado. Article Second of said Last Will and Testament provides as follows:

> I give, devise and bequeath all of my estate and property, both real and personal, of which I may die seized and possessed or to which I may be entitled at the time of my death, and wheresoever situate, to Hammer Sogn Skole Of Vrads, Herred, Aarhus Amt., Jylland, Denmark, to be used by said district in any manner it may wish for the betterment of the schools or aid to the students of said district.

On June 28, 1963, a federal estate tax return was filed for the said estate. On this return, there was reported a gross estate of $180,722.03; deductions of $15,865.22 plus an exemption of $60,000.00 were taken, leaving a net taxable estate of $104,865.81. The federal estate tax reported due on this amount ($21,521.89) was paid at the time the return was filed. No deduction was taken on the said return for bequests for charitable, educational, public or other similar purposes.

On July 9, 1963, a timely claim for refund was filed for the full amount of the federal estate tax reported on and paid with the return, namely $21,521.89. The claim for refund was not allowed and this suit for the said $21,521.89, was timely filed on March 5, 1964, pursuant to 28 U.S.C. Sec. 1340.

On April 9, 1963, an income tax return was filed on behalf of the estate, reporting taxable income for the year 1962 of $1,167.70 and a tax liability of $186.84. No deduction was taken for amounts to be paid to the Danish beneficiary. Petitioner filed a timely claim for refund which has been joined in this proceeding. Income

tax liabilities for subsequent years will be determined by this proceeding.

The Danish beneficiary under the Will is a public school district, run by public officials and constituting a political subdivision of the State of Denmark.

The United States District Court denied relief to the Petitioner and the judgment of that court was affirmed by the Court of Appeals.

REASONS FOR ALLOWANCE OF WRIT

Although applicable statutory provisions governing the income tax and estate tax questions involved in this proceeding have been in force and effect for a period of approximately fifty years, there have been no published decisions or rulings on these questions other than those involved in this proceeding. Since a large section of the population of the United States consists of immigrants and their descendants maintaining some ties to the countries of their origin, we respectfully submit that this court should settle and give proper authority as to what tax limitations are imposed on the benevolence of this large segment of the population.

We are advised, for example, that a case involving a similar estate tax issue, which will be influenced by the decision in this case, is now pending in the Court of Claims of the United States under the title of *Continental Illinois National Bank & Trust Company of Chicago, Executor* v. *The United States,* Docket No. 396-65.

The confusion existing in this area of the law is discussed at length in an article appearing in 17 Tax Law Review 41 (New York University, 1961).

A political subdivision of the State of Denmark is the real party in interest in this proceeding and the decision involves not only our relations with that foreign government but with foreign governments generally. We understand that in the case pending in the Court of Claims a political subdivision of the government of West Germany is involved. As the Court of Appeals indicated, a bequest to a properly qualified *private* foreign school would be deductible and a denial of the same treatment to a *public* foreign school is inconsistent.

In applying the broad brush of the doctrine *inclusio unius est exclusio alterius* to the decision in this case, the Court of Appeals appears to have overlooked the fact that we were *not* arguing a case involving an unrestricted bequest to a foreign government, which we admitted would be non-deductible. As Mr. Justice Holmes stated in *Lochner* v. *New York,* 198 U.S. 45 at page 76, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise". We were arguing only that a bequest restricted to educational purposes is deductible on the theory of such decisions as that in *Matter of Hammargren,* 289 N.Y.S. 681, in which it was stated at page 683: "A municipal corporation maintaining a free school system as one of its functions is an educational corporation within the meaning of the statute, and the legacy to it is exempt from tax." See also the annotation on this subject appearing in 120 A.L.R. 1388.

The income tax issue should have been decided on the basis of statutory provisions materially different from those applicable to the estate tax issue. While we may be precluded from arguing the income tax issue because of a hasty stipulation in the trial Court, we call the attention of this Court to the fact that the decision on

the income tax issue is squarely in conflict with the 1948 decision of the Tax Court in *Estate of Tait*, 11 T.C. 731, which was acquiesced in by the Commissioner of Internal Revenue in Internal Revenue Cumulative Bulletin 1950—1 at page 5.

CONCLUSION

For the foregoing reasons, we submit that the questions presented herein call for an exercise of this Court's power of review.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

(Filed Feb 27 1967)

No. 9041—FEBRUARY 1967 TERM

LLOYD EDWARDS, as Executor of the Will of SEREN P. HANSEN, Deceased,

Appellant,

vs.

V. LEE PHILLIPS,

Appellee.

Appeal From The United States District Court For the District of Colorado.

Thomas Eugene Foster, Chicago, Ill. (H. G. McCarty, and Flanders, McCarty & Wood, Longmont, Colo.; and Thomas J. Boodell, William J. Kilbridge, and Boodell, Sears, Foster, Sugrue & Crowley, Chicago, Ill., with him on the Brief), for Appellant.

Edward L. Rogers, Attorney, Department of Justice, Washington, D.C. (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson, Melva M. Graney, and Jeanine Jacobs, Attorneys, Department of Justice, Washington, D.C.; Lawrence M. Henry, United States Attorney, and David Shedroff, Assistant United States Attorney, of Counsel, with him on the Brief), for Appellee.

Before MURRAH, *Chief Judge*, HILL and SETH, *Circuit Judges*.

SETH, *Circuit Judge*.

The plaintiff-appellant is the executor of the estate of Seren P. Hansen, and the defendant-appellee is the District Director of Internal Revenue for Colorado. The suit is for a refund of estate taxes, and the issue relates to allowable deductions under Section 2055(a) of the 1954 Internal Revenue Code. The United States District Court denied relief to the taxpayer and this appeal was taken.

The decedent died testate, bequeathing his entire estate to the Hammer School District of Vrads Parish in Denmark: "To be used by said school district in any manner it may wish for the betterment of the schools or aid to the students of said district." His net taxable estate was approximately $105,000, and the executor paid about $22,000 in estate taxes with the return, and later filed a claim for a refund on the ground that the bequest to the Danish school district was deductible under § 2055 (a) of the 1954 Internal Revenue Code, 26 U.S.C.A. § 2205 (a).

The trial court construed the statute and concluded that the bequest did not come within the language of any of the subsections of § 2055 (a). The matter was presented on stipulated facts.

A collateral issue is whether the income of the estate was fully deductible under § 642 (a) of the 1954 Code, which allows a deduction for so much of the estate's income used for educational purposes. The claim for refund of the estate's income taxes involves several hundred dollars. The District Court stated in its memorandum and order however that "resolution of the estate tax question will by stipulation determine the income tax issue." In accordance with the understanding of the District Court and the parties during trial, we likewise consider the only question on appeal is whether the estate was entitled to

a deduction under § 2055 (a) for purposes of determining the estate tax.

In the consideration of an issue of this nature, we must start with a general doctrine for construction of provisions in the Revenue Code relating to deductions. It is well established that to be allowable there must be a definite statutory provision describing them. As the Supreme Court said in *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435: "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

The provisions of the act with which we are here concerned allow an estate to deduct the amount of a bequest:

> "(1) to or for the use of the United States, any State, Territory, and political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> "(2) to or for the use of any corporation organized and operated exclusively for . . . educational purposes . . . ;
>
> "(3) to a trustee or trustees, . . . to be used exclusively for . . . educational purposes, . . . ;". § 2055 (a), Internal Revenue Code of 1954; 26 U.S.C.A. § 2055 (a).

The parties agree that the Danish school district in question is publicly governed and financed, and that it is a political subdivision of Denmark. The record discloses that the Danish school district is similar to a typical American school district.

Although the district is a political subdivision of Denmark, the appellant argues, by reference to a number of cases decided by state courts, that the school district is also a corporation operated exclusively for educational purposes under subpart (2) of § 2055 (a), supra. Also in the alternative, the appellant argues that the officials of the school district are trustees whose trust is the use

of the bequest for educational purposes under subpart (3) of § 2055 (a), supra.

The appellee relies primarily on the doctrine *inclusio unius est exclusio alterius,* pointing out that subpart (1) of § 2055 (a) limits deductible bequests to American political subdivisions; therefore under this doctrine bequests to political subdivisions of foreign countries are not deductible. The appellee argues also that the Danish school district's status as a political subdivision of a foreign country is the crucial factor in determining if the bequest is deductible, not whether the Danish school district may be a "corporation" operated for educational purposes or whether the district's officials may be considered to be "trustees" within the language of the bequest, and we agree.

The regulations promulgated under § 2055 (a) do not resolve the question, for they provide only that: "The deduction [allowed by § 2055 (a)] is not limited . . . to transfers to domestic corporations or associations, or to trustees for use within the United States." Treas. Reg. § 20.2055-1(a) (4).

Bequests to foreign corporations, associations, and trustees are eligible for the deduction; however, the school district in question is fundamentally and primarily a political subdivision of Denmark. The District Court held that Congress did not intend to allow a deduction from estate taxes for a bequest to the school district, and that the district was not an American political subdivision as required in subpart (1), was not a corporation like that designated in subpart (2), and the district's elected or appointed officials were not trustees under subpart (3).

The parties have not cited any authority and we find none from which we might ascertain the intent and purpose of Congress in adopting the language of § 2055 (a) and the Treasury Regulations promulgated thereunder as applied to the facts before us. The language of the statute and the regulations seems somewhat inconsistent when

viewed against the arguments of the parties. The appellee argues that bequests to foreign governmental entities are not favored because the American people derive no benefit therefrom. We think this argument is answered by the regulation promulgated under § 2055 (a), quoted supra, which allows the deduction for foreign corporations, associations, and trusts, from which American citizens may derive no direct benefits. The appellee also suggests that bequests to foreign governmental bodies are not favored because there is no guarantee that such bequests will not be used for purposes adverse to the interests of the United States, but the appellee refers us to no authority announcing this policy.

The appellant's argument that the Danish school district qualifies as a corporation under subpart (2) of § 2055 (a) and is thus entitled to a deduction, regardless of the fact that the district is also a political subdivision of a foreign country, is contrary to the specific language of subpart (1) limiting deductions to American political subdivisions as above mentioned.

Had Congress wished to encourage bequests to any governmental entity for public purposes, it would have specifically so provided. The appellant has cited cases in which state courts have exempted from inheritance taxes bequests to municipal corporations that may also be characterized as political subdivisions. The statutes construed in these state cases are different than the federal statute here; moreover, it does not appear that any of the state cases concerned bequests to a foreign governmental entity. Appellant's comparison of the language used in § 2055 of the 1954 Code with that in § 642 does not provide a sound basis for deciding the application of § 2055 to the facts before us. The sections are unrelated and the provisions of one or even the policy expressed in one cannot be carried over to the other.

We find nothing outside the language of the statute that leads to resolution of the question. Thus we are left with the venerable doctrine *inclusio unius est exclusio*

alterius, and we conclude that the language of subpart (1) of § 2055 (a) does not allow a deduction from the gross estate for bequests to foreign governments or political subdivisions thereof. The fact that the Danish school district is a political subdivision of a foreign country is conclusive on the question, and we need not decide whether the district is also a corporation like that designated in subpart (2), or whether the district's officials might be regarded as trustees. The judgment is AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

LLOYD EDWARDS, as Executor of the Will of Seren P. Hansen, Deceased,

Plaintiff,

vs.

V. LEE PHILLIPS,

Defendant.

Civil Action No. 8467

MEMORANDUM AND ORDER
(Filed May 23 1966)

This is a civil action for the refund of federal estate taxes. The facts are generally stipulated and contained in the Pre-Trial Order. Certain exhibits were identified and admitted to supplement the stipulated facts. These are not controverted and are accepted by the court.

There is an issue involving approximately $186 in federal income taxes, but the resolution of the estate tax question will by stipulation determine the income tax issue. The parties also agreed to dispose of the mathematics of the amount of the refund, if any, should the court approve the claim of plaintiff. We, however, deny plaintiff's claim and hold generally for the defendant.

The estate tax issue is whether or not a deduction can be taken for a bequest to a public school district in Denmark.

The stipulations show, as do the exhibits, that the Danish beneficiary under the Will is a public school district, run by public officials and constituting a political subdivision of Denmark.

The statute applicable to the determination of the question is Section 2055 (a) IRC 1954. The section provides in part as follows:

> "(a) In General—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers * * * * *
>
> (1) to or for the use of the United States, any State, Territory, and political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) to or for the use of any corporation organized and operated exclusively for * * * * educational purposes * * * *;
>
> (3) to a trust or trustees, * * * * but only if such contributions or gifts are to be used by such trustee or trustees * * * * exclusively for * * * * educational purposes * * * *."

The regulations promulgated under the foregoing statute, Regulation 20.2055-1, provided in part as follows:

> "§ 20.2055-1 Deduction for transfers for public, charitable, and religious uses; in general—(a) General rule. A deduction is allowed under section 2055 (a) from the gross estate of a decedent who was a citizen or resident of the United States at the time of his death for the value of property included in the decedent's gross estate and transferred by the decedent during his lifetime or by will—
>
> (1) To or for the use of the United States, any State, Territory, and political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) To or for the use of any corporation or association organized and operated exclusively for * * * * educational purposes * * * *;

> (3) To a trustee or trustees, * * * * * if the transferred property is to be used exclusively for * * * educational purposes * * *;
>
> —The deduction is not limited, in the case of estates of citizens or residents of the United States, to transfers to domestic corporations or associations, or to trustees for use within the United States."

Some principles concerning the interpretation of taxing statutes may not be amiss to clarify our views.

Generally speaking where a tax is established deductions to reduce the tax are allowable only if specifically provided by the taxing authority. In addition, public policy favors charitable dispositions; and deduction provisions should be liberally construed. Stated another way if a statutory deduction is clearly established it should be construed to carry out its purpose.

We determine that Congress did not intend to provide for deductions for estate tax purposes of a bequest to a public school district in Denmark.

We hold that such public school district is not a political subdivision of the United States. It is not a "corporation" as that term is used and defined for tax purposes in Section 2055(a)2 or the regulations applicable thereto. (See Sec. 301.7701-1(b) and (c) and 301.7701-2). Its parish council and education committee are elective or appointive public officials and not trustee or trustees as used in 2055(a)(3).

The foregoing Memorandum in our opinion meets the requirements of 52(a) of the Federal Rules of Civil Procedure, and the clerk will enter judgment for the defendant with costs to plaintiff in accordance with Rule 58.

At Denver, Colorado this 23rd day of May, 1966.

(signed) WESLEY E. BROWN
Judge Assigned

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 120

LLOYD EDWARDS, AS EXECUTOR OF THE WILL OF SEREN P. HANSEN, DECEASED, PETITIONER

v.

V. LEE PHILLIPS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The issue in this case is whether the charitable deductions allowed bequests by Section 2055(a) and the income of estates by Section 642(c) of the Internal Revenue Code of 1954 apply to the bequest of Seren P. Hansen of his entire estate to the Hammer School District in the town of Vrads, Denmark, "[t]o be used by said school district in any manner it may wish for the betterment of the schools or aid to the students of said district." Petitioner, the executor of the estate, reported a net taxable estate of $104,865.81, with income during 1962 of $1,167.70. He paid the federal estate and income taxes due on these amounts. Respondent, the District Director, denied a timely claim

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for refund. The district court, in the resulting suit, agreed with respondent, and the court of appeals affirmed.

1. A taxpayer seeking a deduction must show that he clearly comes within the terms of a statutory provision allowing one. See, *e.g., Commissioner* v. *Sternberger's Estate,* 348 U.S. 187, 190 n. 3; *New Colonial Co.* v. *Helvering,* 292 U.S. 435, 440. The only estate tax deduction provision that could apply to the bequest to the Hammer School District is Section 2055(a). It allows deductions for bequests:

> (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) to or for the use of any corporation organized and operated exclusively * * * for educational purposes * * *;
>
> (3) to a trustee or trustees * * * but only if such contributions or gifts are to be used * * * for * * * educational purposes * * *

Subsection (1) is the only provision that deals with bequests to political subdivisions, and in terms it limits deductions to bequests to *domestic* governmental units. The necessary implication of the statutory scheme is that bequests to foreign political subdivisions are not deductible, even though they are for the "public purpose" of education. For Congress plainly intended to treat governmental organizations as separate and distinct entities from the corporations and trusts dealt with in Subsections (2) and (3), and the only gifts to foreign entities that qualify for deduc-

tion are those made to corporations or trusts covered in those subsections. Accordingly, those subsections must be read as encompassing only corporations and trusts which cannot be deemed governmental subdivisions; the only bequests to governmental subdivisions that may be deducted are those to domestic political units.

The parties stipulated, and the courts below held, that the Hammer School District is a political subdivision of the state of Denmark. Its officials are elected or appointed. Their function of administering a public school system is governmental in nature. In all respects the Danish school district is comparable to a United States school district, which would be among the entities described in Section 2055(a)(1). Since that section specifically allows deductions only for bequests to domestic political subdivisions, the courts below correctly denied the deduction to Mr. Hansen's bequest, whether or not the Hammer School District might have some of the characteristics of a corporation or its officials some of the functions of trustees.[1]

In so holding, they properly implemented the statutory scheme,[2] which demonstrates that Congress in-

[1] Cases such as *In re Hammargren's Estate*, 289 N.Y. Supp. 681, on which petitioner relies (Pet. 6), and which interpret provisions of State inheritance tax statutes, are not useful in determining the purpose Congress had in mind when it framed Section 2055(a). The principal holding of *Hammargren* was that a teacher's retirement fund was a subdivision of the government of New York, so that the issue in the instant case was not presented even under the New York statute.

[2] Sections 2522 (a) and (b) of the 1954 Code are also of interest in demonstrating the care with which Congress has defined the circumstances in which gifts to foreign organizations

tended that any testamentary gift to foreign institutions be channeled through private corporations or trusts.[3]

We are aware of only one decision—*Schoellkopf* v. *United States*, 124 F. 2d 982 (C.A. 2)[4]—that in any manner bears on the issue presented here under Section 2055(a). One issue in *Schoellkopf* was whether the settlor of an *inter vivos* trust lost a charitable deduction under the income tax provisions of Section 23(n) of the Revenue Act of 1928, 45 Stat. 791, because of his contingent direction that the trustees pay money to two German cities "for charitable, educational and/or benevolent purposes." Judge Learned Hand de-

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are deductible or otherwise free of tax. Section 2522(a)(2) allows, for gift tax purposes, deductions for gifts from United States citizens or residents to "a corporation, or trust" having specified charitable purposes. Non-resident aliens, on the other hand, may deduct only gifts to a "domestic" corporation, Section 2522(b)(2) or to a "domestic" trust which will use the gift "within the United States", Section 2522(b)(3).

[3] Although Congress has in some circumstances allowed and in some denied charitable deductions for donations to foreign private organization, see, *e.g.*, footnote 2, *supra*, every Code section that allows a deduction for gifts to political subdivisions is expressly limited to gifts to domestic subdivisions, and this has been the case since at least 1918. See Sections 219(b) and 403 of the Revenue Act of 1918, 40 Stat. 1057 (estate tax); Section 214(a)(11) of the Revenue Act of 1921, 42 State 227 (income tax); and Section 505(A)(2)(a) of the Revenue Act of 1932, 47 Stat. 169 (gift tax). The legislative history fails to disclose the purpose of the dichotomy thus drawn between public and private foreign agencies. But the reason may lie in the belief that private beneficiaries, whether foreign or domestic, may be more amenable to the jurisdiction, and therefore the supervision, of domestic courts, than foreign political subdivisions.

[4] *Schoellkopf* was not cited below by either party.

clined to allow the deduction under Section 23(n)(1), which allowed deductions for gifts to *domestic* political subdivisions for "exclusively public purposes". But, he did rule for the settlor under Section 23(n)(2), which allowed deductions for gifts to trusts and corporations for "charitable * * * or educational purposes".

The precise basis of the decision is unclear. It would seem, in view of the facts of the case and the language of the statute, that the dispositive fact was that the gift was made to a trust, which was a recipient expressly named by Section 23(n)(2). The will at issue in the present case did not make use of a trust. Thus, the decision below under Section 2055(a) is in accord with the reading that *Schoellkopf* gives the similar language of Section 23(n) of the 1928 Act.[5]

2. In the district court petitioner's counsel agreed that the deductibility of the estate's 1962 income under Section 642(c) should be governed by the decision respecting the deductibility of the bequest under Section 2055(a). Even if that concession does not bar petitioner from raising the issue, no deduction would be appropriate under Section 642(c), which allows trusts and estates in computing taxable income to deduct any amount which is—

> paid or permanently set aside for a purpose specified in Section 170(c), or is to be used

[5] Unlike the requirements of Section 170(c) (2) and (3) of the 1954 Code, Section 23(n)(2) of the 1928 Act did not require that the gift be to a domestic corporation or trust. Thus, the income tax provisions of the 1928 Act were much like the estate tax provisions now found in Section 2055(a) of the 1954 Code.

> exclusively for religious, charitable, scientific, literary or educational purposes * * *.

A gift to the Hammer School District would not be "for a purpose specified in Section 170(c)," which grants a deduction only for gifts to domestic political subdivisions or to domestic corporations and trusts. Therefore the income of Mr. Hansen's estate may be deducted only if it is deemed to have been "set aside * * * to be used exclusively for * * * educational purposes" within the meaning Congress intended the language of Section 642(c) to have.

These words cannot be read by themselves; they must be placed in the context of the entire system for taxing trusts and estates established by the Internal Revenue Code. So viewed, the essential purpose of this portion of section 642(c) is to allow deductions for sums a trust or estate expends directly for educational purposes, as in operating a school or granting scholarships—Section 170(c) applies only to funds applied to such purposes indirectly through another entity. In no event should the language of section 642(c) be construed as petitioner argues—to allow deductions for gifts to a foreign governmental subdivision, contrary to the clear import of Sections 170(c)(1) and 2055(a)(1).[8]

[8] *Estate of Tait* v. *Commissioner*, 11 T.C. 731, acquiescence, 1950-1 Cum. Bull. 5, on which petitioner also relies (Pet. 7), is not to the contrary. Its holding that the deduction of Section 642(c) (then Section 162(a) of the 1939 Code) applies to estate income given to foreign private charities is entirely consistent with subsections (2) and (3) of Section 2055(a), which, unlike the comparable income tax provisions of Section 170(c), do not limit deductions for estate tax purposes to gifts to domestic corporations and trusts.

3. Certiorari in any event is not warranted because of the limited importance of the issues presented. As petitioner points out (Pet. 5), there has been virtually no litigation on point in a half century. We are aware of no case other than *Schoellkopf*, the present one, and one now pending in the Court of Claims (Pet. 5) in which the question of the deductibility under Section 2055(a) of a bequest to a foreign political subdivision even arguably has been raised.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 120

In the
Supreme Court of the United States
OCTOBER TERM, 1967

LLOYD EDWARDS, as Executor of the Will of Seren P. Hensen, Deceased,

Petitioner,

vs.

V. LEE PHILLIPS,

Respondent.

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Memorandum for the Respondent in Opposition to the Petition for Certiorari, attention is called to the decision in *Schoellkopf* v. *United States,* 124 F. 2d, 982 (C.A.2). Regrettably, this decision did not come to the attention of counsel for the Petitioner in their research and, as stated by the Respondent, it was not cited below by either party and thus the courts below were deprived of the benefit of Judge Hand's views. His views are in direct conflict with those of the courts below in this proceeding. In the *Schoellkopf* case one of the issues related to the deductibility of a contribution to a trust which, under certain circumstances, was to make substantial annual

payments to two German cities for charitable purposes. The statute involved was Section 23 (n) of the Revenue Act of 1928 (26 U.S.C.A., Int. Rev. Acts, page 358) which provided for income tax deductions as follows:

> "In the case of an individual, contributions or gifts made within the taxable year to or for the use of: (1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

The language involved was substantially identical to that in Section 2055 (a) of the Internal Revenue Code of 1954; the argument of the United States was identical to that made on behalf of the Respondent in the proceeding; and the argument made by counsel for the taxpayer and sustained by the Court was identical to the argument of counsel for the Petitioner in this proceeding. Judge Hand refused to read non-existent language into the statute and to apply the doctrine *inclusio unius est exclusio alterius* to the solution of the case, stating at page 985:

> "This the defendant challenges because § 23 (n) (1) exempts gifts made to municipalities within the United States, and by implication does not exempt any others. That would indeed preclude unrestricted gifts to foreign cities, and is a good answer as far as concerns § 23 (n) (1); but § 23 (n) (2) creates an exemption without local limitations when the purposes are charitable as there defined. The canon,

> expressio unius, does not therefore apply, and the gift is exempt unless we must import a general limitation into § 23 (n) (2) so that it shall include no charities except those for the benefit of persons within the United States. We do not understand that the defendant so argues, nor is there any warrant for it in the language of the statute; indeed, the contract between subdivisions one and two strongly suggests the opposite."

No doubt this decision reflected Judge Hand's views of the legal maxims as stated in the comment on the case at bar appearing in Roehner On Federal Taxation, Vol. 12, No. 6, March 24, 1967, p. 29, reading as follows:

> "The court's reliance on the Latin maxim recalls the statement by Lord Shaw: 'The day for canonizing Latin phrases has gone past.' *Ballard* v. *North British Rwy. Co.*, 1923 S.C. (H.L.) 43 at 56. On this point Lord Wright has said: '(T)hese general formulae are found in experience often to distract the Court's mind from the actual exigencies of the case, and to induce the Court to quote them as offering a ready made solution.' (*Lissenden* v. *C.A.V. Bosch, Ltd.* (1940) A.C. 412 at 435.) As Learned Hand felicitously put it in an oft-quoted phrase, they are anodynes for the pains of reasoning."

We repeat that the real party in interest in this proceeding is a political subdivision of the State of Denmark. As the record discloses (R. 55), counsel for the Petitioner were specially retained by the Danish Consul General at Chicago, Illinois, for the sole purpose of representation regarding the tax questions here involved. In addition, the record shows that the only witness at the trial was the Danish Vice Consul and that the documentary evidence as to the nature of the school district was furnished through the Danish Foreign Ministry. In short, both par-

ties to this proceeding are only nominal and it might be more appropriately entitled *Denmark* v. *United States* and considered for certiorari accordingly and in view of the fact that the decision below is in conflict with the decisions in the *Schoellkopf* case and the *Tait* case.

Respectfully submitted,

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